(1)

91-776

No. _____

In The

Supreme Court of the United States

October Term, 1991

STATE OF TENNESSEE,

Petitioner,

vs.

JAMES HOWARD TURNER,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Whether the district court has the authority to order specific performance of an unaccepted plea offer as a remedy for ineffective assistance of counsel during plea negotiations.

Whether, if such authority exists, the State should be forced to overcome a presumption of vindictiveness before withdrawing its previously unaccepted plea offer.

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OPINIONS BELOW

The published opinion of the United States Court of Appeals for the Sixth Circuit was filed on August 7, 1991, and is cited at 940 F.2d 1000. This opinion appears as Appendix A.

The order of the United States Court of Appeals for the Sixth Circuit denying the petitioner's suggestion for rehearing was filed on October 21, 1991. This order appears as Appendix B.

A published opinion of the Court of Criminal Appeals of Tennessee was filed on January 16, 1986, and is cited at 713 S.W.2d 327.

The first published memorandum opinion and order of the United States District Court for the Middle District of Tennessee were filed on June 12, 1987, and are cited at 664 F.Supp. 1113.

The first published opinion of the United States Court of Appeals for the Sixth Circuit was filed on October 7, 1988, and is cited at 858 F.2d 1201.

This Court's order granting the State of Tennessee's petition for certiorari and remanding for further consideration in light of *Alabama v. Smith*, 490 U.S. 794 (1989), was filed on June 26, 1989, and is cited at 490 U.S. 803.

The order of the Sixth Circuit Court of Appeals remanding the case to the district court was filed on August 15, 1989, and is cited at 883 F.2d 38.

The second published memorandum opinion and order of the United States District Court for the Middle District of Tennessee were filed on December 14, 1989, and are cited at 726 F.Supp. 1113.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on August 7, 1991. This petition was filed within 90 days of that date.

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. Amend. VI:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense.

U.S. Const. Amend. XIV, § 1:

> No state . . . shall . . . deprive any person of life, liberty, or property, without due process of law.

STATEMENT OF THE CASE

The respondent was indicted by the grand jury of Davidson County, Tennessee, for the 1980 murder of Monty Hudson and the aggravated kidnapping of Mr. Hudson and his wife, Elizabeth Hudson. Before trial, the prosecutor offered the respondent an opportunity to plead guilty to simple kidnapping and receive a sentence of two (2) years imprisonment. The respondent was advised by one of his attorneys to accept the offer. However, he took the advice of his other attorney, rejected the offer and chose to go to trial.

The respondent's hopes were frustrated when he went to trial on February 9, 1983. Upon his conviction of first-degree murder, he received a sentence of life imprisonment. For each of two convictions of aggravated kidnapping, he was sentenced to serve forty (40) years'

imprisonment. The state trial court ordered these sentences to be served concurrently.

The respondent then reassessed the State's plea offer and filed a motion for a new trial, alleging that counsel's advice to reject the offer violated his right to the effective assistance of counsel. On October 26, 1983, the state trial court granted the respondent a new trial, finding that the respondent had been denied the effective assistance of counsel because one of his two attorneys advised him to reject the plea offer.

On August 7, 1984, the Tennessee Court of Criminal Appeals affirmed the grant of the new trial, and the case was remanded. *State v. James Howard Turner,* Davidson Criminal, C.C.A. No. 83-278-III (opinion released August 7, 1984, at Nashville). The Tennessee Supreme Court denied the state's application for permission to appeal on December 14, 1984.

On remand, the prosecutor reopened negotiations and offered the respondent a sentence of twenty (20) years upon a plea of guilty to aggravated kidnapping. The respondent offered to plead guilty to simple kidnapping, with a maximum sentence of ten (10) years. Negotiations ended when no agreement could be reached.

The respondent then filed a motion in the trial court seeking reinstatment of the offer or dismissal of the indictment. The state trial court granted the motion, finding that a new trial would not effectively remedy the alleged denial of the effective assistance of counsel. However, the trial court specifically found that the prosecutor's offer of twenty (20) years was not tainted by vindictiveness.

The State then filed an application for an extraordinary appeal by permission in the Tennessee Court of Criminal Appeals, which granted the application, reversed the judgment of the trial court and remanded the case for a new trial. *State v. Turner*, 713 S.W.2d 327 (Tenn. Crim. App. 1986). The Tennessee Supreme Court denied the respondent's application for permission to appeal on June 2, 1986. The respondent's petition for the writ of certiorari in this Court was denied on November 3, 1986. *Turner v. Tennessee*, 479 U.S. 933 (1986).

On February 25, 1987, the respondent filed a petition for the writ of habeas corpus in the United States District Court for the Middle District of Tennessee. Finding that a presumption of prosecutorial vindictiveness applies to any plea offer greater than the original offer, the district court granted habeas corpus relief. *Turner*, 664 F.Supp. at 1126. The judgment of the district court was affirmed by the United States Court of Appeals for the Sixth Circuit. *Turner*, 858 F.2d 1201 (6th Cir. 1988).

On December 6, 1988, the petitioner filed a petition for the writ of certiorari in this Court. The petitioner asserted that the courts below erroneously applied a presumption of prosecutorial vindictiveness since the prosecutor's new plea offer embodied a substantial reduction in the charges as well as the permissible punishment for such charges.

On June 26, 1989, this Court granted the petition, and remanded the case for further consideration in light of *Alabama v. Smith*, 490 U.S. 794 (1989). *Tennessee v. Turner*, 490 U.S. 803. The Court below, in turn, remanded the case

to the district court on August 15, 1989. *Turner v. Tennessee*, 883 F.2d 38 (6th Cir. 1989).

The district court filed its second opinion on December 14, 1989, *Turner v. Tennessee*, 726 F.Supp. 1113 (M.D. Tenn. 1989). This time, the district court disregarded the claim of vindictiveness, relied upon Sixth Amendment grounds and ordered the petitioner to reinstate its previously rejected plea offer of two years. Since the order on remand allowed no opportunity to withdraw the offer or show a lack of vindictiveness, the State was left in a worse position than it was in before it successfully appealed to this Court.

Upon the State's second appeal, the Court of Appeals rejected the district court's alternative ruling, but affirmed the judgment on the basis of its earlier ruling. *Turner v. Tennessee*, 940 F.2d 1000 (6th Cir. 1991). After holding that *Alabama v. Smith* does not apply to prosecutors, the court below held that the State could not withdraw its previously unaccepted plea offer without first overcoming a presumption that it was acting vindictively. Having lost any benefit which it hoped to obtain in negotiations, the State must nonetheless extend its original offer unless it overcomes the presumption.

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals presents an important question of federal law regarding the power of the federal courts to control the discretion of state prosecutors in plea bargaining. By ordering the state prosecutor to reinstate an offer which was withdrawn before

acceptance, the court below has exceeded the proper scope of federal power under *Santobello v. New York*, 404 U.S. 257 (1971) and *Mabry v. Johnson*, 467 U.S. 504 (1984).

Furthermore, the decision of the Court of Appeals is in conflict with the decision of the Ninth Circuit upon the same issue presented in this petition. *United States v. Osif*, 789 F.2d 1404 (9th Cir. 1986). The decision also represents a split within the Sixth Circuit upon this issue, in that the lower court has approved without opinion a district court decision that attorney error which denies a defendant an opportunity to plea bargain does not result in the denial or infringements of his constitutional rights. *Ball v. United States*, 653 F.Supp. 44 (E.D. Tenn. 1985), *aff'd* 805 F.2d 1036. The conflict between *Ball* and the opinion below is especially troubling since it suggests that state criminal proceedings are to be governed by a higher standard than federal proceedings.

I. THE DISTRICT COURT HAS NO AUTHORITY TO ORDER SPECIFIC PERFORMANCE OF AN UNACCEPTED PLEA OFFER AS A REMEDY FOR INEFFECTIVE ASSISTANCE OF COUNSEL DURING PLEA NEGOTIATIONS.

The district court's order on remand directed the State to present its previously rejected plea offer of two years' incarceration. 726 F.Supp. at 1118. On appeal, the State asserted that the district court had no authority to order specific performance of an unaccepted plea offer. Brief of Appellant, p. 10. Although the Court of Appeals mitigated the impact of the district court's opinion, it nonetheless exceeded the proper scope of habeas corpus

by imposing limits upon the prosecutor's decision to rescind the unaccepted plea offer.

In its original opinion, the Sixth Circuit noted that remedies for deprivation of the right to effective assistance of counsel should be "tailored to the injury suffered from the constitutional violation." *United States v. Morrison*, 449 U.S. 361, 364 (1981). 858 F.2d at 1207. The proper approach is "to identify and then neutralize the [constitutional violation] by tailoring relief appropriate in the circumstances to assure the defendant the effective assistance of counsel and a fair trial." 449 U.S. at 365. This opinion formed the basis for the lower court's opinion after remand. 940 F.2d at 1001.

As a matter of proper analysis, tailoring a remedy first requires that the alleged constitutional violation be identified. Although there may be rights without remedies, there should be no remedy without first specifying the right implicated. Throughout these proceedings, the courts have assumed that the right to assistance of counsel was violated even though no court has found that counsel's error affected the outcome of the subsequent trial. The decisions of this Court, however, suggest that the right to counsel has been read too broadly.

The respondent has no right to engage in plea negotiations, no right to a particular offer, and no right to acceptance of the plea agreement by the state trial court. *See Mabry v. Johnson*, 467 U.S. 504 (1984); *Santobello v. New York*, 404 U.S. 257 (1971). Accordingly, the courts below erred in attaching constitutional significance to a mere

plea offer which could be withdrawn before its acceptance by the trial court, and where there was no detrimental reliance upon the plea offer.

The State does not suggest that the right to counsel cannot be implicated in plea negotiations. If attorney error during negotiations resulted in the development of evidence admissible at trial, the loss of defenses or the loss of trial rights, *see, e.g., Coleman v. Alabama*, 399 U.S. 1 (1970), the impact of the error at trial would implicate the Sixth Amendment. When the error results in the loss of no right and does not affect the trial, however, it does not rise to the level of a constitutional violation.

Critical stage analysis requires the courts to scrutinize the pretrial confrontation to determine whether the presence of counsel is necessary to preserve the defendant's basic right to a fair trial. *Id.* Although plea negotiations offer an opportunity to avoid trial, defective negotiations generally have no effect upon the fairness of the trial which follows

In this context, counsel's error cost the respondent only an opportunity to which he was not constitutionally entitled. The State was free to refuse to negotiate or to negotiate upon whatever terms it saw fit. Since there was no demonstrated impact upon the subsequent trial, negotiation for the purpose of avoiding trial is not a critical stage of the trial.

Recently, this Court has held that a prisoner cannot complain of constitutionally ineffective assistance of counsel in post-conviction proceedings since there is no constitutional right to counsel in such proceedings. *Coleman v. Thomspon*, ___ U.S. ___, 111 S.Ct. 2546, 2566 (1991).

In the context of plea negotiations, there is no right to negotiate, much less a right to an attorney for purposes of negotiations. Absent such a right, any error by counsel does not require a constitutionally mandated remedy.

If this Court determines that the respondent has a right to counsel which was violated during plea negotiations, the question remains whether ordering the prosecutor to reinstate an earlier offer is a narrowly tailored remedy for the violation. A plea bargain is contractual in nature, and is measured by contract law standards. *United States v. Reed*, 778 F.2d 1437, 1441 (9th Cir. 1985), *cert. denied*, 479 U.S. 835, 107 S.Ct. 131 (1986), *Baker v. United States*, 781 F.2d 85, 90 (6th Cir. 1986), *cert. denied*, 479 U.S. 1017, 107 S.Ct. 667 (1986). "For the equitable remedy of specific performance to be granted there must be a valid and enforceable contract." J. Calamari & J. Perillo, *Contracts*, §16-8 (1977), *citing* Restatement of Contracts §358, Comment e.

Even when a plea agreement exists, and the prosecution has breached it, the federal courts do not have the authority to order specific performance of the agreement. The federal courts lack the supervisory authority to specify the remedy for a state prosecutor's breach of a plea bargain. *Santobello v. New York*, *supra*, 404 U.S. at 262-263. The Constitution does not compel the grant of specific performance. *Mabry v. Johnson*, 467 U.S. 504, 509 n. 11 (1984). The most logical conclusion flowing from *Mabry* is that the district court has no authority to order the prosecutor to reinstate the rejected plea when he was not "negligent," "culpable," or otherwise responsible for the rejection of the offer.

The lower courts' grant of specific performance of an unconsummated plea offer will "unnecessarily infringe on competing interests," and is thus not warranted or appropriate. *Morrison, supra,* 449 U.S. at 364. Moreover, the relief ordered is not tailored in terms of providing the respondent a fair trial, but rather gives him a means of avoiding trial without compensating the State for its loss of the benefits it sought through negotiation.

The lower courts' error is underscored by the fact that the prosecutor was not responsible for counsel's error: "The state of Tennessee, as prosecutor, has done nothing improper to bring about that state of affairs." *Turner v. Tennessee,* 858 F.2d 1201, 1209 (6th Cir. 1988) (Ryan, J., concurring in part and dissenting in part). Thus, "[t]he government is not responsible for, and hence will not be able to prevent, attorney errors that will result in reversal of a conviction or sentence." *Strickland v. Washington,* 466 U.S. 668, 693 (1984). Furthermore, the State has lost any benefit it hoped to obtain from the original offer even though the defendant had a fair trial with an opportunity for acquittal.

In summary, the Constitution does not guarantee a defendant the right to engage in plea negotiations or a particular disposition of his case. Since the remedy accorded by the state courts, i.e., a new trial, carries with it the assurance that the respondent will receive the effective assistance of counsel, the district court erred in determining that the respondent is constitutionally entitled to reinstatement of the previously rejected two-year plea offer. Accordingly, the judgment granting the respondent habeas corpus relief must be reversed.

II. THE STATE SHOULD NOT BE FORCED TO OVERCOME A PRESUMPTION OF VINDICTIVENESS BEFORE WITHDRAWING ITS PREVIOUSLY UNACCEPTED PLEA OFFER.

The Court of Appeals has determined that the State is presumptively vindictive for failing to reinstate its original plea offer even though the prosecutor has tendered a new plea offer embodying a substantial reduction in the charges pending against the respondent and the permissible punishment for such charges. Although *Alabama v. Smith* considered the question of judicial vindictiveness, its reasoning applies with equal force when a prosecutor seeks a harsher sentence after having lost the very benefits which originally prompted the lenient offer. "[A]fter trial, the factors that may have indicated leniency are no longer present." 490 U.S. at 801.

Although a judge may gain more new information from a trial than the prosecutor, 940 F.2d at 1002, the lower courts' reasoning ignores the reality that all involved learn something when a case goes to trial. The State learned that its witness would endure and that earlier apprehensions were misplaced. The defendant learned that the State's proof was stronger than he thought. When the prosecutor has lost his only motive for offering leniency, the circumstances do not indicate the realistic likelihood of vindictiveness which is necessary before the presumption applies. *United States v. Goodwin*, 457 U.S. 368 (1982).

The Court of Appeals has fashioned a remedy which represents a substantial intrusion into the exercise of

prosecutorial discretion. To remedy an alleged due process violation, the Court of Appeals has effectively ordered specific performance of a plea offer which was withdrawn before acceptance unless the State carries the burden of proving a non-retaliatory motive.

The petitioner recognizes the proposition that where a convicted defendant has successfully availed himself of his statutory or constitutional rights to obtain direct or collateral relief from his conviction, the prosecution may not institute additional or more severe charges against the defendant which pertain to the same criminal episode in order to punish the defendant for exercising his rights or to discourage other defendants from exercising their rights. *See, e.g., Goodwin, supra; Blackledge v. Perry,* 417 U.S. 21 (1974); *North Carolina v. Pearce,* 395 U.S. 711 (1969).

While a presumption of vindictiveness may apply where the prosecution institutes additional or more severe charges against a defendant, such a presumption should not apply in circumstances where the prosecution's conduct amounts to nothing more than pursuing the original criminal charges upon rejection of the offer. *See, e.g., Vardas v. Estelle,* 715 F.2d 206, 213 (5th Cir. 1983); *United States v. Brooklier,* 685 F.2d 1208, 1215 (9th Cir. 1982), *cert. denied,* 459 U.S. 1206 (1983). The threat to try a defendant upon the original indictment is implicit in any plea negotiation.

In the case at bar, the prosecutor did not institute additional or more severe charges against the respondent. Rather, by tendering a twenty (20) year plea offer, the prosecutor actually reduced the charges pending against the respondent from first-degree murder and two (2)

counts of aggravated kidnapping to one (1) count of aggravated kidnapping. In offering the respondent this particular bargain, the prosecutor also dramatically reduced the permissible range of punishment for these charges from three (3) consecutive terms of life imprisonment to a mere twenty (20) years' incarceration. Under these circumstances, it cannot be said that the prosecutor's conduct following reversal of the conviction represented an adverse change in the charging decision following the initial trial. 457 U.S. at 383.

In *United States v. Osif*, 789 F.2d 1404 (9th Cir. 1986), the defendant successfully appealed his conviction of murder. On remand, the prosecutor offered a sentence of fifteen (15) years upon a plea to second degree murder, whereas the pretrial offer was for ten (10) years. Under the circumstance, the court rejected the claim of prosecutorial vindictiveness:

> [T]he vindictive prosecution doctrine does not apply when neither the charge's severity nor the sentence is increased. [Citations omitted]. Here, neither the sentence nor the charge was increased. Rather, the government merely refused to reoffer, after an intervening conviction for first-degree murder, as lenient a bargain as was previously rejected by Osif prior to trial.
>
> Further, vindictiveness is not present if there are independent reasons or intervening circumstances to justify the prosecutor's action. [Citations omitted]. Osif's intervening first-degree murder conviction, . . . , is an intervening circumstance that properly could cause the prosecutor to view a new plea offer in a different

> light. Under any standard of review, we cannot find government vindictiveness.

Id., at 1405.

While the rationale of *Osif* is persuasive and better reasoned than that of the court below, there are other reasons which compel the conclusion that there is no reasonable likelihood of vindictiveness on the part of the prosecutor in tendering a plea offer involving more that two (2) years incarceration. Most significantly, the concept of prosecutorial vindictiveness is foreign to the plea bargaining process, where both parties possess relatively equal bargaining power and where the respondent is free to accept or reject the prosecutor's offer without exposing himself to greater or additional charges. *See Bordenkircher v. Haynes*, 434 U.S. 363, 365 (1978).

Moreover, the prosecutor's desire to forego a jury trial by engaging in plea negotiations (despite knowledge that he could, in fact, convict the respondent of first-degree murder and two (2) counts of aggravated kidnapping) is constitutionally legitimate where there is no dispute but that the respondent is properly charged with first-degree murder and two (2) counts of aggravated kidnapping. *Id.*

For these reasons, the petitioner submits that the Court of Appeals erred in according a mere plea offer constitutional significance by applying a presumption of prosecutorial vindictiveness to any subsequent plea offer greater than the original, unconsummated offer of two (2) years.

CONCLUSION

For these reasons stated, the petitioner urges this Court to grant the writ of certiorari.

Respectfully submitted,

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No. 90-5109

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

JAMES H. TURNER, *Petitioner-Appellee,*	)	ON APPEAL from the United States District Court for the Middle District of Tennessee
v.	)	
STATE OF TENNESSEE, *Respondent-Appellant.*	)	

Decided and Filed August 7, 1991

Before: KEITH, MARTIN, and RYAN, Circuit Judges.

MARTIN, Circuit Judge, delivered the opinion of the court, in which KEITH, Circuit Judge, joined. RYAN, Circuit Judge, (pp. 6-9) delivered a separate dissenting opinion.

BOYCE F. MARTIN, JR., Circuit Judge. In our prior decision in this case we held that the due process clause of the fourteenth amendment requires the State of Tennessee to provide a showing that the withdrawal of a former plea offer to a habeas corpus petitioner who was unconstitutionally deprived of effective assistance of counsel at the pre-trial stage was free of a reasonable apprehension of prosecutorial vindictiveness. *Turner v. Tennessee*, 858 F.2d 1201 (6th Cir. 1988). The United States

Supreme Court granted certiorari, vacated the judgment, and remanded the case for consideration in light of *Alabama v. Smith*, 490 U.S. 794 (1989), in which the Court found no judicial vindictiveness "where a second sentence imposed after a trial is heavier than a first sentence imposed [by the same judge] after a guilty plea." *Id.* at 875. On remand, the district court concluded that the *Alabama v. Smith* analysis should have no effect on the present case, but ultimately relied on other grounds in making its decision. We agree with the district court that *Alabama v. Smith* does not apply, and therefore affirm the district court's original opinion, 664 F. Supp. 1113, on that basis.

Because the facts of this case have been set forth in two prior opinions, *Turner v. Tennessee*, 664 F. Supp. 1113 (M.D. Tenn. 1987), *aff'd*, 858 F.2d 1201 (6th Cir. 1988), we state only the essential facts. At some time prior to February 9, 1991, the State of Tennessee, through Assistant District Attorney General John Zimmerman, offered James Turner a two-year prison term in return for a guilty plea to simple kidnapping for the abduction and murder of Monte Hudson. On the unconstitutionally ineffective advice of counsel, Turner declined. Turner was thereafter tried and convicted of one count of felony murder and two counts of aggravated kidnapping. He was sentenced to life imprisonment for murder plus forty years for each kidnapping count.

Turner was granted a new trial on the grounds that he had received ineffective assistance of counsel in deciding to reject the two-year plea offer. Plea negotiations were reopened; however, Assistant District Attorney General Zimmerman, again representing the interests of

the State of Tennessee, refused to offer Turner a plea bargain of less than twenty years imprisonment. After exhausting all possible state remedies, Turner sought relief from the United States District Court for the Middle District of Tennessee. The district court determined that the appropriate remedy for the deprivation of Turner's sixth amendment rights would be a new plea hearing during which a rebuttable presumption of prosecutorial vindictiveness would attach to any plea offer made by the State in excess of its original two-year offer. A prior panel of this court affirmed the district court's decision. We now reconsider that holding in light of *Alabama v. Smith*.

We find *Alabama v. Smith* to be inapplicable to the present case because the controversy before us was neither borne of the same circumstances nor would it satisfy the rationale underpinning the *Alabama v. Smith* holding. *Alabama v. Smith* addressed the appropriate standard for determining the possibility of vindictiveness on the part of a sentencing judge where that judge had previously imposed a lesser penalty pursuant to a guilty plea. In *Smith*, the trial judge sentenced the defendant to two concurrent terms of thirty years imprisonment under the terms of a plea agreement between the prosecution and the defendant. 490 U.S. at 796. Under that agreement, a third charge was dropped. Thereafter, Smith successfully challenged the validity of his guilty plea and was tried on the original three charges before the same trial judge. *Id.* Smith was convicted of all the charges against him and was sentenced to two concurrent terms of life imprisonment and one consecutive term of 150 years imprisonment. *Id.*

Smith challenged his increased sentence because of the reasonable likelihood of vindictiveness on the part of the sentencing judge, similar to that found in *North Carolina v. Pearce*, 395 U.S. 711 (1969) (presumption of judicial vindictiveness arises where defendant receives greater penalty upon reconviction after the first conviction has been overturned on appeal and remanded for a new trial). The Supreme Court rejected Smith's challenge stating,

> [w]hen a greater penalty is imposed after trial than was imposed after a prior guilty plea, the increase in sentence is not more likely than not attributable to the vindictiveness on the part of the sentencing judge. Even when the same judge imposes both sentences, the relevant sentencing information available to the judge after the plea will usually be considerably less than that available after a trial. . . . As this case demonstrates, in the course of the proof at trial the judge may gather a fuller appreciation of the nature and extent of the crimes charged. The defendant's conduct during trial may give the judge insights into his moral character and suitability for rehabilitation. Finally, after trial, the factors that may have indicated leniency as consideration for the guilty plea are no longer present.

Alabama v. Smith, 490 U.S. at 801 (citations omitted).

These factors distinguish *Alabama v. Smith* from the Court's holding in *Pearce* because

> [t]here, the sentencing judge who presides at both trials can be expected to operate in the context of roughly the same sentencing considerations after the second trial as he does after

> the first; any unexplained change in the sentence is therefore subject to a presumption of vindictiveness.

Alabama v. Smith, 490 U.S. at 802.

At the most cursory level, the case before us is easily distinguishable from *Alabama v. Smith* because it involves a question of prosecutorial rather than judicial vindictiveness. The Court in *Alabama v. Smith* simply did not speak to prosecutorial conduct other than to reiterate in a footnote that a realistic likelihood of vindictiveness is necessary before a presumption of prosecutorial vindictiveness can be applied. *Id.* at 873 n.3; *see also United States v. Goodwin*, 457 U.S. 368 (1982) (discussing criteria for determining when a realistic likelihood of prosecutorial retaliation exists). We find nothing in *Alabama v. Smith* to disturb the Court's prior holding in *Goodwin*, and therefore our position remains consistent that *Goodwin* requires a presumption of prosecutorial vindictiveness in this case. *Turner v. Tennessee*, 858 F.2d at 1208.

At a more meaningful level however, the present case is not only factually distinct from *Alabama v. Smith*, but logically distinct as well. The concern stated by the Court in *Smith* – that a sentencing judge be free to weigh the various factors that come to light during a trial which may not have been revealed at the pre-trial stage – does not arise in this case. The prosecution is unlikely to gain any new insight as to the moral character of the defendant, the nature and extent of the crime, or the defendant's suitability for rehabilitation at the conclusion of trial that it did not already possess from its extended investigation. Rather, the prosecution in such circumstances "can be expected to operate in the context of

roughly the same sentencing considerations . . . ; any unexplained change in the sentence is therefore subject to a presumption of vindictiveness." *Alabama v. Smith*, 490 U.S. at 802.

For the foregoing reasons, we find our prior decision in this case to be unaffected by *Alabama v. Smith*, and therefore affirm the judgment of the district court that the case be returned to the state forum where the prosecution may rescind its original plea offer only upon overcoming a presumption of vindictiveness.

RYAN, Circuit Judge, dissenting. We have obediently given this case "further consideration in light of *Alabama v. Smith*, 490 U.S. [794] (1989)," only to conclude, unanimously, that *Smith* casts no new light on the issues addressed in *Turner v. Tennessee*, 858 F.2d 1201 (6th Cir. 1988). The majority has reiterated its judgment that at the new plea hearing to be held in the state court, a rebuttable presumption of vindictiveness will attach to any sentence bargain offer made by the state in excess of its original offer of a two-year sentence cap.

In my separate opinion, concurring in part and dissenting in part, in *Turner, supra*, I expressed agreement with the district court's judgment that a writ of habeas corpus should issue in this case and found no fault with the remedy – a show cause hearing – that the district court fashioned in order to rectify the constitutional violation that occurred. I stated further, however, that I could not agree with the district court and the *Turner* majority that at the new plea hearing a presumption of vindictiveness should attach to the state's twenty-year

plea bargain offer or to any offer by the state for confinement in excess of two years. I continue to be of that mind and, for the reader's convenience, restate here a portion of what I wrote in *Turner, supra:*

> I cannot agree with the district court's determination that a presumption of vindictiveness should attach to the state's twenty-year plea bargain offer. There is not the slightest indication in this record that the state's offer to the defendant to recommend that the trial court accept a plea of guilty to one count of aggravated robbery with a maximum sentence of twenty years' confinement is vindictive action taken as a means to punish the defendant for successfully appealing his conviction and seventy-year sentence.
>
> The unique facts of this case warrant the unique relief we have approved – a hearing at which the state is required to show cause why its former offer of a two-year maximum sentence should not be reinstated. But nothing in this court's opinion or the district court's suggests a valid reason for further burdening the state's position by imposing a judge-made presumption, albeit rebuttable, that the state's twenty-year plea offer is vindictive. The controlling Supreme Court authorities for determining whether a presumption of vindictiveness should be judicially imposed make clear that "the Due Process Clause is not offended by all possibilities of increased punishment . . . but only by those that pose a realistic likelihood of 'vindictiveness.' " *United States v. Goodwin,* 457 U.S. 368, 384 [] (1982); *Blackledge v. Perry,* 417 U.S. 21, 27 [] (1974). There is no such realistic likelihood

in this case. The state originally had a compelling reason for making the inordinately lenient offer to Turner of a two-year plea: the concern that the prosecution would fail because Mrs. Hudson, one of the kidnapping victims, was "apprehensive about testifying again at the Turner trial," since she had already been through the unpleasant experience of testifying against Turner's co-defendant, Passarella. Apparently Mrs. Hudson's family also shared her reluctance to face the ordeal of another trial. Through no fault of the state of Tennessee, that early lenient offer was rejected by the defendant and the state was required to proceed to trial, risking the possibility of losing the case entirely if Mrs. Hudson's "apprehensiveness" hardened into non-cooperation. As it turned out, it did not. She testified against Turner, and he was convicted of two counts of kidnapping and one count of murder in the first-degree.

The convictions and the seventy-year sentence that resulted have now been set aside. The defendant, save for the unconstitutional ineptness of his retained counsel, would ordinarily be entitled to no more than a trial with the prospects of acquittal and freedom on the one hand, or a conviction and confinement for any number of years up to life on the other. The state of Tennessee, as prosecutor, has done nothing improper to bring about that state of affairs. The compelling motivation it once had to "give away the store," in the form of a two-year plea agreement, no longer exists, however. Nevertheless, the state has offered to allow Turner to plead guilty to a single count of aggravated kidnapping rather than the two counts of aggravated kidnapping and one of murder in the first

> degree, and to recommend a sentence of not more than twenty years. Whether Tennessee should be permitted to rescind its previous two-year plea offer in favor of its present twenty-year offer is a matter to be resolved by the state trial judge. No reason has been shown, however, to justify imposing upon the proceedings a judicial determination that the offer the state presently has on the table reflects presumptively vindictive retaliation against the accused for proving that he was the victim of the unconstitutional ineffectiveness of his retained counsel.
>
> I would return the proceedings to the trial court for a hearing requiring the state of Tennessee to show cause why the original two-year plea offer should not be reinstated, but without the application of any presumption in the matter because it is evident from the record before us that the state's twenty-year plea offer does not "pose a realistic likelihood of vindictiveness." *Goodwin, supra; Blackledge, supra.*

Turner, 858 F.2d at 1209-10.

No light is cast by the Supreme Court's *Smith* decision upon what the majority has approved in this case because the facts of the two cases are so distinctly different. *Smith* involves application of a vindictiveness presumption to judicial action, whereas here, the majority approves application of a vindictiveness presumption to executive discretion – a plea bargain offer. Nothing in the *Pearce/Goodwin/Blackledge* jurisprudence justifies applying a presumption of vindictiveness to the government's discretionary authority to offer or not to offer a plea bargain, as it wished.

No. 90-5109

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JAMES HOWARD TURNER, Petitioner-Appellee,	)	ORDER
v.	)	(Filed Oct. 21, 1991)
STATE OF TENNESSEE, Respondent-Appellant.	)	

BEFORE: KEITH, MARTIN and RYAN, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and less than a majority of the judges having favored the suggestion, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER
OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk